IN THE

Supreme Court of the United States

October Term, 1954

No. 7

WILBURN BOAT COMPANY, ET AL.,
Petitioners

VERSUS

FIREMAN'S FUND INSURANCE COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals, Fifth Circuit

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BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

A.

Opinions Delivered Below

The opinion of the District Court is unreported. It is incorporated in the judgment of the Trial Court (R. 19, 20). The opinion of the Fifth Circuit Court of Appeals (R. 199-206) is reported in 201 F. 2d 833, 1953 AMC 284.

B.

Jurisdiction

Jurisdiction of the court was invoked by petition for certiorari under 28 USC 1254 (1), Certiorari was granted on 26 April 1954 (R. 207).

C.

Constitutional Provisions and Statutes Involved

Article I, Section 8, Clause 3—UNITED STATES CONSTITUTION

> "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Article III, Section 2—UNITED STATES CONSTITUTION

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * *, to all Cases of admiralty and maritime jurisdiction; * * * to Controversies between * * * Citizens of different States, * * *."

Article X—AMENDMENT TO THE UNITED STATES CONSTITUTION

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Title 15—UNITED STATES CODE, Chapter 20, "Regulation of Insurance" 15 USC 1011-1015.

The McCarran Act

15 USC 1011—*"Declaration of policy."*

"Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

15 USC 1012—*"Regulation by State Law*; Federal law relating specifically to insurance; applicability of Certain Federal laws after June 30, 1948."

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; * * *."

15 USC 1014—*Applicability of Merchant Marine Act of 1920.*

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the * * * Act of June 5, 1920, known as the Merchant Marine Act, 1920.

28 USC 1333—*Admiralty, Maritime and Prize Cases*

"The district courts shall have original jurisdiction, exclusive of the courts of the States of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

Applicable State Statutes

VERNON'S TEXAS STATUTES—Chapter 10, Revised Civil Statutes 1936, Article 4890—entitled *"Lien on Insured Property"* (1951 Texas Insurance Code, Art. 5.37)

> "Any provision in any policy of insurance issued by any company subject to the provision of this law to the effect that if said property shall be encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any character then such encumbrance shall render such policy void and shall be of no force and effect. Any such provision within or placed upon any such policy shall be null and void."

VERNON'S TEXAS STATUTES—Chapter 10, Revised Civil Statutes 1936, Article 4930, entitled *"Breach by Insured"* (1951 Texas Insurance Code Art. 6.14)

> "No breach or violation by the insured of any warranty, condition or provision of any fire insurance policy, contract of insurance, or application therefor, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property."

VERNON'S TEXAS STATUTES—Chapter 21, Revised Civil Statutes 1936, Article 5054, entitled *"Texas Laws Govern Policies"* (Art. 21.42 of 1951 Texas Insurance Code)

> "Any Contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract

was executed and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same."

D.

Questions Presented for Review

1. Are the insurance statutes of Texas, regulating the terms of a marine insurance policy in reference to the encumbrance and use of a small boat, rendered inapplicable by general admiralty law in a case where a foreign corporation, authorized to do business in the State, issues a marine insurance policy to citizens of that State?
2. Does Article III, Section 2 of the United States Constitution exclude marine insurance from the McCarran Insurance Act of 1945 (15 USC 1011-1015) so that States cannot regulate the business of marine insurance conducted within its boundaries by foreign corporations authorized to do business within the State?
3. Where there is no proof in the record that three named individual assureds changed their interest in their vessel, can the transfer of said vessel from their partnership to their corporation be construed as a sale under the terms of an alienation clause and thereby cause their rights to be forfeited?

E.

Concise Statement of the Case

(a) Pertinent Facts

This lawsuit was originally instituted in the Texas State Court at Denison, Texas, from whence it was removed to

the civil side of the docket in the Federal District Court at Sherman, Texas, on the grounds of diversity of citizenship.

Petitioners are citizens of Texas and are marine insurance policy holders seeking to recover from respondent insurance company for the loss of their Motorboat WANDERER which was destroyed by fire on February 25, 1949, while she lay afloat, moored close to shore, in Lake Texoma, an artificial inland lake between Texas and Oklahoma.[1]

The WANDERER was a small wooden inland vessel, 65 x 17 x 3 feet with a six cylinder 225 H.P. engine. The vessel's registered hailing port was Denison, Texas, and she was documented in Houston, Texas (R. 52) for miscellaneous service (R. 49). Petitioners purchased the houseboat WANDERER from Marshall and Shuler of Rock Island, Illinois, and each of the petitioners acquired an undivided one-third interest in the vessel (R. 43-44).

Respondent is a fire and marine insurance company incorporated in California, with its principal office in San Francisco, and was qualified and certificated to do business in the State of Texas at the time the policy was issued and delivered to petitioners at Denison, Texas. According to respondent's sworn statement, which is of public record in Austin, Texas, Fireman's Fund Insurance Company agreed to comply with the Texas insurance laws for the year ending May 31, 1949, in accordance with the provisions of Chapter 11 and 18, Title 78, REVISED CIVIL STATUTES, TEXAS, 1925. (See Appendix A) Chapter 11 is entitled "Fire and Marine Companies".

The policy in question was purchased from R. L. McKinney

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[1] See Stipulation of Facts (R. 23-25). Most of the pertinent facts are stated therein.

Agency, an insurance agency doing business in Denison, Texas, and the premiums were delivered to this agency at Denison, Texas (R. 89). The McKinney Agency delivered the policy to petitioners at their place of business in Denison, Texas (R. 61) and the policy was made payable at Denison, Texas (R. 168). The McKinney Agency transmitted the order for insurance to respondent insurance company through the H. H. Cleaveland Agency, of Rock Island, Illinois, whose authority to issue policies of insurance was limited to the Rock Island, Illinois area.[2] R. L. McKinney examined, inspected and evaluated the risk and made a survey of the boat for respondent and reported to respondent concerning the risk (R. 64, 193). Prior to the loss of the WANDERER, R. L. McKinney requested respondent to increase the insurance coverage from $10,000.00 to $40,000.00 (Rossow Deposition pp. 29, 30). For an additional premium respondent agreed to increase the valued policy to $40,000.00 (R. 167). After the increased risk was accepted, respondent sent the Denison, Texas agency an application form for the coverage in question. Mr. McKinney typed in the answers to numerous questions propounded by respondent and had J. F. Wilburn sign the application (R. 65, 67, 68, 190 to 194). This application stated that the WANDERER was to be used for commercial purposes and was to be chartered (R. 68, 191). The application was forwarded to respondent on February 9, 1949 and was in respondent's possession at the time the WANDERER was destroyed (R. 69, 97). The R. L. McKinney Agency knew that the Wilburn brothers incorporated their partnership and thought he had so advised respondent (Rossow Exhibit # 41). All correspondence between the parties concerned is found attached

[2] Depositions of White, p. 12 and Rossow, p. 42. White Exhibit No. 1.

to the depositions of P. B. White and E. H. Rossow, sent to this Court as an original exhibit.

Effective as of June 9, 1948, respondent issued a policy of marine insurance to "Frank and Henry Wilburn d/b/a Wilburns Bros., Denison, Texas," covering the WANDERER against fire loss (R. 168, 169). This was accomplished by attaching an endorsement on a "Port Risk" policy issued to Marshall and Shuler, the former owners of the WANDERER. On July 10, 1948, the three brothers changed their partnership to a corporation (R. 197) and each of the named assureds retained their same interest in the boat, in that they each owned one-third of the stock of the corporation (See Appendix B). After the three brothers incorporated their partnership the respondent by written endorsement changed the named assureds to read as follows: "Glen, Frank and Henry Wilburn d/b/a Wilburns Boat Company" (R. 165). This endorsement was effective August 6, 1948. No provision in the policy required the Wilburn brothers to do business as a partnership or corporation while they conducted their business in the name of Wilburn Boat Company.

(b) ALLEGED POLICY VIOLATIONS

1. MORTGAGING THE WANDERER

Respondent seeks to avoid liability under the terms of the policy on the grounds that the policy in question is null and void because petitioners admit that they mortgaged the WANDERER without the written consent of respondent. (R. 23, 24) The pertinent policy provision reads as follows (R. 176):

> "It is Also Agreed that this insurance Shall be void in case this Policy or the interest insured thereby shall be

* * * pledged without previous consent in writing of the Assurer."

The insurance statutes of Texas declare that the above policy provision is null and void.[3]

Respondent contends, and the lower court ruled, that this Texas statute cannot apply to a marine insurance policy because it is contrary to general admiralty law and that admiralty law governs to the exclusion of State insurance regulations regarding the encumbrance of property (R. 205). The lower court held that the above encumbrance clause involves characteristic features of substantive admiralty law (R. 204) and that under admiralty law marine insurance contracts must be enforced as written. (R. 202). This legal axiom is as common to common law as it is to admiralty law. It is significant that admiralty law does not recognize a common law mortgage[4] and it is not a characteristic feature of admiralty law.

2. Breach of Warranty of Use

Respondent also contends that since petitioners admit that they chartered the WANDERER several times prior to the loss (R. 62), without an appropriate endorsement on the policy, they thereby breached the contract of insurance and cannot recover for the loss of the WANDERER. The warranty alleged to be breached reads as follows (R. 173):

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[3] Vernon's Texas Civil Statutes, Article 4890.

"Any provision in any policy of insurance issued by any company subject to the provision of this law to the effect that if said property shall be encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any character then such encumbrance shall render such policy void shall be of no force and effect. Any such provision within or placed upon any such policy shall be null and void."

[4] **Bogart v. The John Jay** (1854), 17 How. 58 U.S.) 399; **The J. E. Rumbell** (1892), 148 U.S. 1, 15, 16.

"Warranted by the assured that the within named vessel shall be used solely for private pleasure purposes during the currency of this policy and shall not be hired or chartered unless permission is granted by endorsement hereon."

This defense is urged by respondent notwithstanding the fact that the Texas legislature has declared that a breach of a warranty, of any contract of insurance upon personal property, will not constitute a defense to a suit for the loss thereof, "unless such breach or violation contributed to bring about the destruction of the property." [5]

The chartering of the WANDERER at some remote time previous to the loss did not, and could not, contribute to the loss of the vessel. Several days previous to her destruction the WANDERER returned to her mooring at Burns Run Resort on the Oklahoma side of Lake Texoma, after having left a shipyard on the Texas side of the lake, and was unmanned and was not being used for any purpose when she was lost (R. 63).

The lower court disregarded the Texas causal relation insurance statute [6] on the grounds that since a maritime contract was involved general admiralty would govern to

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[5] Vernon's Texas Civil Statutes, Article 4930.

"No breach or violation by the insured of any warranty, condition or provision of any fire insurance policy contract of insurance, or application therefor, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property."

Also see—**Springfield Fire and Marine Insurance Co. v. K.M.A. Fuel Co.**, 78 S.W. 2d 1053 (1935) construing the above statute in a case where the use of a motor vehicle was involved.

[6] See Footnote 5.

the exclusion of State statutes. The rule that warranties must be literally complied with in an insurance contract is as much a part of the common law as of admiralty law. See *Fire Insurance Co. v. Coos County* (1894), 151 U.S. 452, a common law action of assumpsit upon a fire insurance policy insuring a court house. This case was relied upon by the lower court to establish the rule that general admiralty law governs (R. 203). It was because of the rule in *Coos County* case that Texas enacted a statute requiring the insurance company to prove that the breach of warranty contributed to the loss. The people in Texas felt that foreign insurance companies doing business in Texas should not issue policies limiting their insurance coverage by a continuing warranty unless the breach of the warranty contributed to the loss. Respondent questions the right of Texans to so limit warranties in a marine insurance policy. The answer to the objection is that petitioners contracted to do business with the people of Texas in accordance with the provisions of their insurance statutes and the premiums charged Texans should take into account the statutory limitations herein presented.

3. The Sale of the Wanderer

Respondent also seeks to avoid liability under the terms of the policy in question on the grounds that on September 28, 1948, petitioners transferred the Wanderer from J. H. Wilburn, J. F. Wilburn and L. G. Wilburn to their corporation, Wilburn Boat Company (R. 51) without the written consent of respondent. The policy provision relied upon by respondent reads as follows (R. 176):

> "It is Also Agreed that this insurance shall be void in case this Policy or the *interest insured* thereby shall be

> sold, assigned, transferred or pledged, without previous consent in writing of the Assurer" (Emphasis Supplied).

There is no proof in the record that the insured interest of the three named individuals changed when they transferred their boat to their corporation. Except for the corporate fiction, the one-third interest of each of the Wilburn brothers in the WANDERER remained unchanged. Nevertheless, the lower court held that the petitioners sold their boat to their corporation and this sale was a breach of the warranty quoted above and that petitioners thereby lost whatever contractual rights they had. On this point petitioners take issue on common law grounds.

Additional defenses, based on alleged concealment and misrepresentation were pleaded by respondent but the lower courts did not rule on same and they present no issue here.

(c) THE LOSS WAS COVERED

There is no question that the loss of the WANDERER was covered by the standard marine perils and fire clause, in the marine hull policy now being considered. The pertinent part of this clause reads as follows (R. 173):

> "Touching the adventures and perils which we, the assurers, are contended to bear, and do take upon us, they are of the seas, man-of-war, fire, * * *."

Respondent raises no issue concerning the coverage of this standard marine insurance clause. There is no issue and no proof as to the cause of the fire which destroyed the WANDERER or the applicability or construction of the above clause. The insurance company's attack is based upon the breach of other policy provisions designed to cut down the above sea peril and fire coverage. On the one hand, respondent relies on the sanctity of their finely printed

marine insurance contract and on the other hand, petitioners rely on the sanctity of the State insurance statutes which are designed to prevent insurance companies from whittling down liability on an accepted risk. It therefore appears that the controlling issue presented for review is whether or not Texas insurance laws apply to a marine insurance policy issued to Texans by a foreign corporation authorized to do business in Texas when the policy insures a small inland vessel against fire loss. According to the Texas insurance statutes, Texas laws govern this policy.[7] If the laws of Texas are applicable to a foreign corporation authorized to do business in Texas then, in spite of the argument that general admiralty law governs, petitioners are entitled to recover the amount of their valued policy plus interest from February 25, 1948.

F.

Argument

Point I

General Admiralty Law does not outlaw the State Insurance Statues regulating foreign corporations doing business within the State.

(a) Insurance Is Not Commerce

Ever since insurance became an established business in this country repeated efforts have been made by foreign insurance corporations to shake themselves loose from the insurance regulations of the several States. To accomplish this purpose efforts were made to have this Court declare

[7] Vernon's Texas Statutes—Chapter 21, Revised Civil Statutes, 1936, Article 5054, entitled **"Texas Laws Govern Policies"** (Article 21.42 of 1951 Texas Insurance Code). Quoted on page 4.

that insurance is commerce and that under the U. S. Constitution a State is prohibited from regulating companies engaged in interstate commerce. This Court, however, has repeatedly held that as between the assured and the insurance company the issuing of insurance is not a transaction of commerce but a simple contract of indemnity and like other personal contracts they are local transactions and are governed by local law. Insurance is not a commodity, it is a personal service.[8]

(b) POLICE POWER OF THE STATES v. MARITIME LAW

In *Osborn v. Ozlin* (1939), 310 U.S. 53, 65, 66, this Court held:

> "Government has always had a special relationship to insurance. The ways of safeguarding against untoward manifestations of nature and other vicissitudes of life have long been withdrawn from the benefits and caprices of free competition. The State * * * may curtail drastically the area of free contract, * * * ."

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[8] **Paul v. Virginia** (1868), 8 Wall. (75 U.S.) 168; **Hooper v. California** (1895), 155 U.S. 648; **New York Life Insurance Company v. Cravens** (1900), 178 U.S. 389; **New York Life Insurance v. Deer Lodge County** (1913), 231 U.S. 495; **United States v. Southeastern Underwriters Association** (1944), 322 U.S. 533; **Robertson v. California** (1946), 328 U.S. 440; **Vance on Insurance** (3rd Edition 1951), pages 125-139. *"Rights of Foreign Insurers"* where the above cases are discussed. Also see a discussion of these cases at the *Joint Hearing Before Subcommittees of Committees on the Judiciary, 68th Congress on S 1362, HR 3269 and HR 3270, bills "To Affirm the Intent of Congress That the Regulation of the Business of Insurance Remain Within the Control of the Several States * * * " (McCarran Act of 1945).* Statement of Senator Bailey, pages 2 to 9, and statement of Hon. Francis Biddle, Attorney General of the United States, pages 29 to 35, 54, to the effect that the insurance companies are reversing their attack and fighting Federal regulation when heretofore they fought State regulation; that what the insurance companies really want is no regulation and that no Court has ever held that the power of interstate commerce excludes appropriate police powers of the State.

In order to eliminate State insurance regulations the respondent advocates that *Hooper v. California* (1895), 155 U.S. 648, a marine insurance case, be disregarded. This case held that State insurance regulations must be followed by foreign insurance companies authorized to do business within the State. As a substitute for the valid exercise of the police power by the State, respondent suggests that the terms of a marine insurance policy be governed solely and exclusively by general admiralty law. Since a national bill regulating marine insurance would be unconstitutional[9] this would be equivalent to granting to marine insurance companies a blanket license to operate without legal restraint. The marine insurance business is too complex to be regulated by decisional law. Regulations as to available defenses must by necessity be handled by the legislative branch of the State governments so that the public interest is protected.[10]

The lower Court apparently takes the position that the general admiralty law overrides the above inherent police power of the several States on the grounds: first, that the marine insurance policy is a maritime contract [11] and therefore all terms or defenses to the policy must be governed exclusively by general admiralty law. Second, that all State

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[9] Congressional Record, 67th Congress, Vol. 62—Part III, pages 2521 and 2522, Debate on Bill S 2265.

[10] Article X, Amendment to the United States Constitution. **United States v. South-Eastern Underwriters Ass'n.** (1944), 322 U.S. 533, 544; **Robertson v. California** (1946), 328 U.S. 440, 447.

[11] **De Lovio v. Boit** (1815), 2 Gall 399, Fed. Case No. 3,776, and **New England Mutual Marine Ins. Co. v. Dunham** (1870), 11 Wall. (78 U.S. 1) held that a marine insurance policy is a maritime contract and within admiralty jurisdiction but these cases do not go so far as to outlaw State statutes regulating the terms and defenses available to foreign corporations doing business within the State.

statutes relating to a marine insurance policy are rendered inapplicable upon the authority of *Knickerbocher Ice Co. v. Stewart*[12] (1920), 253 U.S. 149; a tort case involving State Workman's Compensation Acts; and *Union Fish Co. v. Erickson*[13] 1919), 248 U.S. 308; and *Just v. Chambers*[14] (1941), 312 U.S. 383, a death claim involving a State survival statute. None of these cases involve a conflict between the police power of a State and admiralty law relating to maritime contracts. It is interesting to note that Justice Reynolds said in *Southern Pacific v. Jensen* (1917), 244 U.S. 205, 216:

> "In view of these Constitutional provisions and the Federal Act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by State legislation. That this may be done to some extent cannot be denied."

In the same case on page 228, Justice Pitney, referring to the Judicial Code (now 28 U.S.C. 1333) said:

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[12] A companion case to **Southern Pacific v. Jensen (1917), 244** U.S. 205.

[13] Reliance on this case is obviously misplaced because there the State of California attempted to legislate in a field already taken over by Federal legislation. To-wit: laws relating to seamen contracts, whereas in the case at bar Congress has declined to legislate on insurance contracts. See **Red Cross Line v. Atlantic Fruit Co.** (1924), 264 U.S. 109, a contract case involving an arbitration clause in a charter party. State law prevailed.

[14] A death claim which is supplementary to admiralty law. See **Western Fuel Co. v. Garcia,** 257 U.S. 233 at 242. "The subject is maritime and local in character, and the specified modification of or supplement to the rule applied in admiralty courts when following the common law will not work material prejudice to the characteristic features of general maritime law, nor interfere with the proper harmony and uniformity of the law in its international and interstate relations."

"I have been unable to find anything even remotely suggesting that the judicial clause was designed to establish the maritime code or any other system of laws for the determination of controversies in the courts by it established, much less any suggestion that the maritime code was to constitute the rule of decision in common-law courts, either Federal or State."

(c) The Jensen Line of Cases

The doctrine of the *Jensen* line of cases, which includes *Knickerbocher Ice Co.* case, has been questioned by this Court in *Standard Dredging Corp. v. Murphy*, 319 U.S. 306, 309 (1943) where an attempt was made to apply the *Jensen* doctrine to the field of unemployment insurance. The Court said:

"Indeed, the *Jensen case* has already been severely limited, and has no vitality beyond that which may continue as to State workman's compensation laws."

The *Jensen doctrine* permits matters of "local concern" to be regulated by State statutes.[15] Since the early cases of *Paul v. Virginia* (1868), 8 Wall. (75 U.S. 168), and *Hooper v. California* (1895), 155 U.S. 648, 654, a marine insurance policy has been declared a local transaction or a matter of local concern. If an insurance policy is a local transaction under the commerce clause of the U. S. Constitution, Art. 1, Sec. 8, Cl. 3, as the last two cases clearly hold, then it would be inconsistent to rule that under Article III, Section 2 of the same Constitution the same insurance policy

[15] **Miller Indemnity Underwriters v. Braud, et al.** (1926), 270 U.S. 59, 64. See **Cooley v. Board of Wardens of Philadelphia** (1851) (12 How.), 53 U.S. 299, and **The General Smith** (1819), 4 Wheat 438, 4 L. Ed. 609. The last two cases no doubt are the basis of the "local concern" exception to the **Jensen** line of cases. Also see **The Lottawana** (1874), 21 Wall. 88 U.S.) 558, 580, 581.

is not a local transaction and must be governed by admiralty law to the exclusion of State law. If the commerce and admiralty clause of the Constitution are both applicable to the field of marine insurance then the only way this Court can be consistent is to rule that the *Jensen* line of cases outlawing State law are inapplicable to a marine insurance policy. It would be far safer and infinitely more practical to follow the rationale in *Cooley v. Board of Wardens*, 53 U.S. 299 than attempt to apply the uniformity doctrine to a marine insurance policy.

(d) Characteristic Features of Admiralty Law

In a Limitation of Liability Proceeding [16] which is a characteristic feature of maritime law, the proceeds from a marine insurance policy cannot be reached by individuals having a claim against an offending vessel or her owner because an insurance policy has been held to be a personal contract.[17] For the same reason a maritime lien-holder cannot reach marine insurance proceeds in event the vessel is destroyed and neither does a marine insurance contract import a maritime lien which is a characteristic feature of admiralty law.[18] If a contract of marine insurance is so personal that it cannot be reached in admiralty litigation involving

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[16] 46 U.S.C. 181-189.

[17] **Maryland Casualty Co. v. Cushing** (1954) —U.S.—, 98 L. Ed. 519, 1954 A.M.C. 837; **The City of Norwich** (1886), 118 U.S. 468.

[18] **A. M. Bright Grocery Co. v. Lindsey** (1915), 225 Fed. 257, 261; also see **Insurance Co. of Pennsylvania v. Proceeds of the Sale of the Barge Waubaushene**, 24 F. 559 (1885, N.Y.), where the Court held that a policy of marine insurance on a vessel is not such a contract as to import a maritime lien. The insurance company could not collect marine insurance premiums by an "in rem" proceeding because a maritime lien does not extend to contracts which do not aid the vessel but are merely for the personal benefit of the owner.

characteristic features of maritime law then it would be inconsistent to rule that such a maritime contract is by itself a characteristic feature of admiralty and cannot be governed by State insurance statutes which regulate the issuing of this type of contract and the defenses thereto. Certainly, the Petitioners, who are grocerymen in a small town many miles removed from the sea, did not have in mind any characteristic features of maritime law when they entered into the contract in question. It is safer to assume that they bought this coverage with the Local Laws in mind.

Congress, in Public Law 162 (1922), defines marine insurance as follows:

> "Marine insurance" means insurance against any and all kind of loss of or damage to vessels, craft, cars, aircraft, automobiles, and other vehicles, whether operated on or under water, land, or in the air, in any place or situation, and whether complete or in the process of or awaiting construction; also all goods, freights, cargoes, merchandise, effects, disbursements, profits, money, bullion, precious stones, securities, choses in action, evidences of debt, including money loaned on bottomry and respondentia, valuable papers, and all other kinds of property and interests, therein, including liabilities and liens of every description, in respect to any and all risks and perils while in the course of navigation, transit, travel, or transportation on or under the sea or other waters, on land or in the air or while in preparation for or while awaiting same or during any delays, storage, transshipment or reshipment incident thereto, including builder's risks, and any loss or damage to property or injury or death of any person, whether legal liability results therefrom or not, during awaiting or arising out of navigation, transit, travel or transportation, or the construction or repair of vessels; * * *." (District of Columbia Code, 1951 Edition, Title 35, Sec. 1101).

This Congressional definition sets up marine insurance as a multiple line insurance business. It is obvious that what is labelled marine insurance today would not necessarily come within the decision of *New England Mutual Marine Ins. Co. v. Dunham* (1870), 11 Wall (78 U.S.). So if a policy of marine insurance must be exclusively governed by maritime law to the exclusion of State insurance statutes then a large number of fringe and marginal insurance cases can be expected in all Federal Courts. If the laws of the 48 States relating to marine insurance are not uniform what will happen to uniformity when the various Federal Judges in this country rule on a marine policy and attempt to allocate common law and maritime law to an insurance contract in order to determine whether or not State insurance statutes are applicable. Suppose a sack of flour is sent from Kansas to Switzerland and is insured under a standard marine insurance cargo policy with a standard warehouse to warehouse clause in the contract. The flour is thus insured during land storage and transportation by rail, truck, airplane and ship. Suppose that the sack of flour is destroyed when a motor truck carrying this shipment is involved in an automobile collision on the Pennsylvania Turnpike. Would a controversy over an alleged breach of warranty be governed by maritime law, to the exclusion of all State laws? How much maritime flavor must a marine insurance policy have before it would work material prejudice to any characteristic feature of maritime law? Would the rule be different for cargo and for hull policies?

Whatever characteristic features of admiralty law are involved in the controversy between petitioners and respondent concerning the common law chattel mortgages and the warranty of use, it must be conceded that they involve as

much of a characteristic of common law as of admiralty law. We are not dealing here with the construction of a perils of the sea clause, or an Inchmaree clause, or a marine watchman clause [19] but rather with the validity of State insurance statutes regulating defenses that an admitted foreign insurance company cannot use in order to escape contractual liability. Under the circumstances serious consideration should be given to the observation made by Justice Holmes in the *Jensen* case:

> "If admiralty adopts common law rules without an act of Congress, it cannot extend the maritime law as understood by the Constitution. It must take the rights of the parties from a different authority, just as it does when it enforces a lien created by a State. The only authority available is the common law of a State. For, from the often repeated statement that there is no common law of the United States * * * the natural inference is that, in the silence of Congress, this Court has believed the very limited law of the sea to be supplemented here as in England by the common law, and that here that means, by the common law of the State. * * * Even where the admiralty has unquestioned jurisdiction the common law may have concurrent power * * *. The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; * * *.
>
> "* * * It is too late to say that the mere silence of Congress excludes the statute or common law of a state from supplementing the wholly inadequate maritime law of the time of the Constitution, in the regulation of personal rights, and I venture to say that it never has been supposed to do so, or had any such effect." [20]

[19] **Aetna Ins. Co. v. Houston Oil & Transport Co.** (5 Cir. 1931), 49 F. 2d 121, Cert. Den. 284 U.S. 628.

[20] **Southern Pacific v. Jensen** (1917), 244 U.S. 205, 221, 222. Also note dissenting opinion of Justice Pitney (pgs. 226, 227). He in

(e) Historical Sketch of Marine Insurance [21]

When marine insurance was first conceived it was an accepted rule that it had to be regulated by a governing body. At first the business was controlled by groups of merchants and then at the local level by municipal regulation. The local law became known as "law merchant". These laws form the foundation of our present concepts of all property insurance, marine and otherwise. When England grew to be a leading commercial nation she used marine insurance to foster her commerce and develop other branches of insurance. On the other hand marine insurance business in the United States developed out of the fire insurance business which has always been regulated by the several states. It is significant that in this country today fire insurance companies control the marine insurance business and that is why we find fire policy restrictions in marine insurance policies. These fire policy restrictions became so comprehensive that the states had to regulate the terms of fire insurance policies and finally establish statutory forms. In the marine business there are no statutory forms of insurance and underwriters mold the terms and conditions of the policy to fit the unregulated rates or vice versa.

The regulation of the marine insurance business by the judiciary was never looked upon with favor. Controversies over marine insurance policies were purposely kept out of the early English courts, and were handled by committees

effect says that if the States have concurrent jurisdiction—and they have over a marine insurance policy—then in the absence of legislation by Congress—concerning the terms and conditions in a marine insurance policy—the States are at liberty to administer their own laws when exercising concurrent jurisdiction with admiralty and are at liberty to change those laws by statute.

[21] Winter on Marine Insurance, 1952, Third Edition, 1 to 32.

made up of merchants familiar with marine risks and shipping. The jealousy of the early common law courts and admiralty courts of England was so great that insurance matters were finally removed from both courts and referred to a special insurance court.[22] As the insurance business developed in England, Parliament took over the regulation of the business and today British marine insurance business is regulated and governed by the *Marine Insurance Act, 1906*.[23] On the other hand, Congress has consistently declined to regulate any type of insurance business and by the *McCarran Act* declared that it is the policy of the United States government to leave the regulation of insurance to the States. An examination of the history of this Act reveals the fact that this Court set the pattern for the *McCarran Act* by its decisions in *Paul v. Virginia* (1868), 75 U.S. 168 and *Hooper v. California* (1895), 155 U.S. 648.

Point II

Congress has declared that the Marine Insurance business shall be governed by State Laws.

(a) The Model Marine Insurance Act Passed By Congress in 1922

For three years, 1919-1922, the marine insurance business was investigated from top to bottom by government experts, and by the House Committee on Merchant Marine & Fisheries and the Senate Committee on Commerce. As a result of this extensive study it was concluded that the States had the right to control and regulate the marine insurance business and that the only way to secure uniform

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[22] **Vance on Insurance**, 1951 Edition, pp. 11 to 20.

[23] A copy of the Act is set out in **Arnould on Marine Insurance**, 3rd Edition (1950), Vol. 2, pages 1202-1227.

marine insurance regulations was for Congress to set up a model code of marine insurance law for the District of Columbia in the hopes that all other States would copy this code.[24]

At a Senate hearing on S. 210, a bill *"To Regulate Insurance in the District of Columbia, and for other Purposes"*, Senator Nelson asked Mr. Rush, president of Insurance Company of North America, whether or not it would be possible for Congress to enact a law governing strictly marine insurance in view of the recent Supreme Court decisions.[25] Mr. Rush answered that it would require a constitutional amendment to pass a federal insurance act regulating the marine insurance business.[26] The general counsel for the marine underwriters stated on page 158 of the same hearing:

> "That as you cannot constitutionally legislate on a national bill which would override and control all such matters within the States you do the next best thing to it, namely; set an example within the territorial sphere where your will is supreme; and by so doing you blaze the way; that to use perhaps a more maritime term, you lay the buoys which should mark the channel to a proper method to that which is in its nature an international transaction, and therefore you teach the States what they should follow. If the proper note is sounded, if the proper example is set in Washington by you

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[24] 62 Congressional Record, pp. 2521, 2522, 67 Cong., 2nd Session (1922).

[25] The Senator no doubt referred to the then recent decision of **Southern Pacific v. Jensen** (1917), 244 U.S. 205, and **Knickerbocher Ice Co. v. Stewart** (1920), 253 U.S. 149.

[26] Page 140 of *Hearings before the Senate Committee on Commerce, 67th Congress (1921) on S. 210, a bill "To Regulate Marine Insurance in the District of Columbia and for other Purposes."*

gentlemen, the States are a hundred times more inclined to follow that example, to fall in line, and say 'This is a matter which we have looked at too long and too narrowly'."

Counsel for the marine underwriters explained that he relied upon *Hooper v. California* (1894), 155 U.S. 648 and other Supreme Court decisions cited to support the above statement.[27]

The Model Marine Insurance Act (S. 210) became law in 1922.[28] By agreement between the underwriters and steamship owners, Section 20, of the proposed bill (S. 210) relating to "just enforcement of policy forms and conditions; the formulation and enforcement of uniform, efficient and economical practices * * * " by insurance groups organized for "concerted action" was deleted from the bill. It was then argued that there cannot be uniform terms and conditions in a marine insurance policy because these are the competitive elements of the business.[29]

(b) The Merchant Marine Act of 1920

Prior to the enactment of The Model Insurance Code, Congress enacted a law declaring that Federal antitrust laws

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[27] Pages 154 and 155 of Senate Hearing cited in footnote 26. The other decisions are: **Allgeyer v. Louisiana,** 165 U.S. 578 (1896); **Nutting v. Massachusetts,** 183 U.S. 553 (1901); **Thames & Mersey v. U. S.,** 237 U.S. 19 (1914); **Peck & Co. (Inc.) v. Lowe,** 247 U.S. 165 1917).

[28] 62 Congressional Record, 67th Congress, 2nd Session, page 3408, Public Law 162 of Mar. 4, 1922, 42 Stat. 408, ch. 93, title 5 & 15. Also see District of Columbia Code, 1951 Edition, Title 35, Section 1101-1134.

[29] Statement of Ira Campbell, General Counsel for Steamship owners, pages 76 and 77 of Senate Hearing referred to in footnote 26.

would not apply to the marine insurance business[30]. With the aid of the Federal government, marine insurance syndicates were established so that we could compete with the foreign marine insurance market.[31]

(c) The McCarran Act

It may be illuminating to know that the Attorney General of the United States, on October 20, 1943, many months prior to this Court's decision in the *Southeastern Underwriter's* case,[32] requested the Joint Committee of Congress considering the *McCarran Act*, to leave his department alone in the *Southeastern Underwriter's* case because "* * * it would be a little more sporting to let the Supreme Court decide the questions of law and then determine the policy of Congress".[33] Based on the Transcript of the Joint Hear-

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[30] Merchant Marine Act of 1920, 46 U.S.C. 885 (b) "Nothing contained in the 'anti-trust laws' as designated in Section 12 of Chapter 1 of Title 15, shall be construed as declaring illegal an association entered into by marine insurance companies for the following purposes: To transact a marine insurance and reinsurance business in the United States and in foreign countries and to reinsure or otherwise apportion among its membership the risk undertaken by such association or any of the component members."

[31] Statement of Professor S. S. Huebner, pages 16 and 17 of the Senate Hearing referred to in footnote 26. Syndicates were formed to insure the hulls of ocean going vessels only. The insurance on the WANDERER comes within the inland marine insurance classification and that classification is further broken down into "dry" and "wet."

[32] **United States v. South-Eastern Underwriters Ass'n.** (1944), 322 U.S. 533.

[33] Pages 59 and 60—*Joint Hearings before Subcommittees of the Committees on the Judiciary*, 78th Congress, 1st Session, on S. 1362, H.R. 3269, and H.R. 3270, "*Bills to Affirm the Intent of Congress that the Regulation of the Business of Insurance Remain within the Control of the Several States and that the Acts of July 2, 1890 and October 15, 1914, as amended, be not Applicable to That Business.*"

ings it would be erroneous to state that the *McCarran Act* was passed because of the Supreme Court decision in the *Southeastern* case. It would almost seem that the reverse was true. When the Joint Hearings began on October 20, 1943, Senator Bailey, a co-sponsor of the *McCarran Act* made the following statement: [34]

> "More is involved than the pending litigation. It is relevant only as informing us that the national policy is involved. The Congress may at any time or under any circumstances declare what that policy is or is intended to be. The Courts interpret laws and determine rights in controversy; the Congress enacts laws, declares and determines public policy. It is the duty of the executive branch to follow that policy as determined by Congress. If any department or bureau of the Government undertakes to determine public policy by judicial process, or judicial definition or administrative regulation, the Congress has the prior right to preserve and the duty of preserving the public policy, of which it is the creator and guardian, by plain and timely declaration. This is no interference with judicial process but affirmative exercise of the true function of the Congress. What we have to deal with is the proposition to declare insurance to be commerce and thus authorize Federal control in place of State control, and also that Congress shall substitute a Federal system for supervision of insurance for the long established State systems.
>
> "There is no twilight zone or no man's land here: [35]

[34] Pages 2 and 3—Same as preceding footnote.

[35] No doubt referring to **Davis v. Department of Labor and Industries of Washington** (1942), 317 U.S. 249, where the "Twilight Zone" doctrine was adopted and where this Court said: "Too much has happened in the twenty-five years since that ill starred decision (Jensen case). Federal and State enactments have so accommodated themselves to the complexity, and confusion introduced by the **Jensen** rulings that the resources of adjudication can no longer bring relief from the difficulties which judicial process itself brought into being."

Either the Congress would take over the regulation of fire insurance or it would be left to the States; and if fire insurance is commerce among the States, there is no room for doubt as to the instant effect: The States will be eliminated from a field of far-reaching importance to their citizens, to their revenue and their powers and a business of the utmost importance to millions of the population as policyholders, which has been built up into a great and necessary relationship and usefulness under State regulation, which has served and grown admirably under State systems of supervision, would be torn from the system to which it, the people and the States have become adapted, and taken over by a Federal Bureau—a far-reaching step in unnecessary centralization. One hesitates to contemplate the consequence; no one can foresee the extent of the disruption, the confusion; nor may one say into what sort of circumstances one of the universal activities of the American people would be cast—without sound reason or any justification in necessity or prospect of improvement.

"Manifestly more than the application of the antitrust laws is involved. Manifestly more than the Georgia district court case is involved. We stand here not only upon the threshold of a public policy involving not only the whole field of a great financial activity of the utmost value and usefulness to the people but also at the doors of every legislative hall in every State, proposing to take from them a function under their inherent police powers, which, so far as I know, no one challenges their competence to perform after more than a century of beneficient experience."

The above statement of Senator Bailey together with this Court's decision in the *South-Eastern Underwriter's* case and subsequent cases,[36] leaves little doubt that the rule of

[36] **South-Eastern Underwriters**, 322 U.S. 533; **Prudential Insurance Co. v. Benjamin**, 328 U.S. 316; **Robertson v. California**, 328 U.S. 443.

Hooper v. California, is still applicable to a marine insurance policy [37] and that the *McCarran Act* has made the Texas statutes, herein referred to, a part of the marine insurance contract now being considered. The Texas statutes are as much a part of this contract as if the parties had copied them in full as part of the conditions of the policy and any terms placed in the contract by respondent which are in conflict with the Texas statutes are null and void.[38]

Point III

The fact that the Wilburn brothers transferred the Wanderer from their partnership to their corporation without Respondents approval cannot support a forfeiture of the policy because there is no proof that there was a change of their insurable interest in their vessel.

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[37] **Hooper v. California,** 155 U.S. 648, 655. "The State of California has the power to exclude foreign insurance companies altogether from her territory, whether they are formed for the purpose of doing a fire or a marine business. * * * And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation. * * * The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the State which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the Constitution of the United States."

[38] **Vance on Insurance,** Third Edition (1951), page 279. Also see **Camden Fire Insurance Co. v. Clayton,** 6 S.W. 2d 1029, 1030 (1928, Tex. Sup. Ct.), and **New York Life Ins. Co. v. Cravens** (1900), 178 U.S. 389. "Foreign corporations which do business in a State do so, not by right but by grace and must in so doing conform to its laws; they cannot avail themselves of the benefits without bearing its burdens."

This point was not raised in the petition for certiorari because it involves principles of common law and not admiralty law but in order that a complete determination of the facts relating to alleged breach of warranties may be made this point is presented.

Volume 29, *American Jurisprudence* 505, Section 630, states the applicable rule in these words:

> "Generally any material change of title, although not by alienation, will avoid an insurance contract which provides that any change in title shall avoid it; but if the real ownership remains the same, although there is a change in the evidence of title, such change being merely nominal, and not of a nature calculated to diminish the motives of the insured to guard it from loss, the policy is not violated."

Each of the three Wilburn brothers originally purchased an undivided one-third interest in the WANDERER and when they lost their vessel each of them still had an undivided one-third interest in the vessel because they each owned one-third of the stock of their corporation. The name of their corporation was the same as the name of their partnership. The act of changing their partnership into a corporation was merely incidental to the coverage involved and was not of a nature calculated to diminish their motive to guard the WANDERER against loss. The burden of proving that this was not the case rested upon the respondent. There is no proof that the ***insurable interest*** of the Wilburn brothers changed because the actual facts would not support such proof. (Appendix B)

Courts will construe the terms of a marine insurance policy to avoid forfeiture if it is possible to do so, and if necessary lift the corporate veil to preserve the right of aggrieved as-

sureds. Here the named assureds are the three Wilburn brothers doing business as Wilburn Boat Company. There is no restriction in the policy that the three brothers must conduct their business as a partnership or as a corporation, so it is only fair to conclude that any ambiguity in this respect must be resolved in favor of the assured.[39]

G.

Conclusion

It has been pointed out that this Court has consistently held that an insurance policy is not a commodity but a personal service and that the commerce clause of the U. S. Constitution does not apply to a marine insurance policy because it involves a personal transaction. That being the case, the States have the power to admit foreign insurance companies desiring to do business within the State under the conditions imposed by the insurance statutes of the State. It was further pointed out that the general police powers given to the States take precedence over general maritime law because the issuance of a marine insurance policy is a matter of local concern. There are no characteristic features of maritime law involved in reference to a common law mortgage or a continuing warranty of use.

The *McCarran Act* declares the policy of the Federal government in plain, unequivocable terms, and the fact that the marine insurance associations mentioned in the Merchant Marine Act of 1920 were included in the *McCarran*

[39] See **Thompson v. Phenix Insurance Company of Brooklyn** (1890), 138 U.S. 287, involving a successor receiver and an alleged change of title. The Court held: "If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured."

Act is a clear indication that marine insurance business comes within the scope of the latter act.

Marine insurance today is a multiple line business and any attempt by the judiciary to regulate the terms of multiple line marine insurance policies would create such confusion that the resources of adjudication would complicate an already complex business to the point where our economy would suffer a serious set-back. The various States in the Union have successfully regulated the marine insurance business, as well as all other types of insurance business, throughout the history of our country and the fact that today our marine insurance business is prospering as it has never prospered before should be a persuasive force in determining the applicability of State regulation to marine insurance. An established system of State regulation worked successfully for over a century and should not at this time be overthrown by the questionable doctrine of the *Jensen* and *Knickerbocher decisions.*

Respectfully submitted,

HOBERT PRICE,
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Houston 2, Texas

ALEXANDER GULLETT,
Of Counsel;
T. G. SCHIRMEYER,
Submitted Brief for
Petitioners

APPENDIX A

Certificate No. 2213 Company No. D 313

BOARD OF INSURANCE COMMISSIONERS

of the

STATE OF TEXAS

THIS IS TO CERTIFY THAT

FIREMAN'S FUND INSURANCE COMPANY

San Francisco, California

has, according to sworn statement, complied with all requirements applicable thereto and is hereby authorized to pursue the business of

> Fire; Marine; Lightning; Tornado; Auto; Riot and Civil Commotion; Explosion; Earthquake; Accident; Health; Plate Glass; Liability; Workmen's Compensation; Common Carrier Liability; Boiler and Machinery; Burglary; Theft and Larceny; Sprinkler; Team and Vehicle; Automobile and Aircraft; Property Damage and Collision

insurance within this State for year ending May 31, 1949, in accordance with provisions of Chapters 11 and 18, Title 78, R. C. S., Texas, 1925.

IN WITNESS WHEREOF, I hereunto sign my name and affix my official seal at Austin, Texas, this 19th day of April, 1948.

(SEAL) s/ George B. Butler,
Chairman of the Board

APPENDIX B

STATE OF TEXAS §
§ ss.
COUNTY OF GRAYSON §

AFFIDAVIT

Glenn Wilburn, Frank Wilburn, and Henry Wilburn being duly sworn on oath depose and say that they are the incorporators and sole stockholders of Wilburn Boat Company and are the same individuals as L. G. Wilburn, J. F. Wilburn and J. H. Wilburn, mentioned in the articles of incorporation of Wilburn Boat Company; that when the Motorboat WANDERER became a total loss they each owned one-third (1/3) of the stock of said corporation and that their interest in the WANDERER did not change during the period of time beginning June 7, 1948, the date they acquired said inland craft, to the day it became a total loss on February 25, 1949.

(s) Glenn Wilburn

Glenn Wilburn

(s) Frank Wilburn

Frank Wilburn

(s) Henry Wilburn

Henry Wilburn

Sworn to and subscribed before me this 19th day of July A.D. 1954.

(s) James P. Riley

(Seal)

Notary Public, Grayson County, Texas